



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

March 25, 1993

Dean Marriott, Commissioner
Maine Department of
Environmental Protection
State House
Station 17
Augusta, ME 04333

Re: EPA CWA Section 303 Approval of Change to
Ripogenus Impoundment Water Quality Standard

Dear Commissioner Marriott:

I am responding to the State's February 8, 1993 and October 26, 1992 letters proposing a downgrade in Maine's water quality standard for the Ripogenus Impoundment on the West Branch of the Penobscot River. Based on the information supplied by the Maine Department of Environmental Protection (DEP), including the use attainability analysis (UAA) prepared with assistance from Bowater/Great Northern Company and the public comment on that UAA, and for the reasons set forth below, we approve the State's proposed change in the criteria for the "habitat and aquatic life" use for this water body, to that contained in Part A of P.L. 1992, Chap. 813.

According to the October 26 letter, the proposed change is based on 40 C.F.R. §131.10(g)(4). This subsection provides for the removal of, or establishment of a subcategory of, a designated use, if the State demonstrates that:

dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that will result in the attainment of the use.

The October 26 letter further states that environmental studies conducted by Bowater/Great Northern Company, support the conclusion that it is not feasible to operate the company's hydropower project in such a way that the Ripogenus impoundment would meet the current "natural" criteria for the aquatic life use for this water body. For clarification, the ability of the impoundment to meet the Class A/GPA "natural" criteria is not at issue in this reclassification. Rather, the question is whether the UAA demonstrates that the Ripogenus Project precludes the attainment of the criteria in the Class C habitat and aquatic life use, and it is not feasible to operate the dam in a way that



will result in the attainment of that use.¹

We recognize that currently there is no national EPA guidance on the interpretation of 40 C.F.R. §131.10(g)(4), in particular guidance on when it is "feasible" to modify the operation of a dam so that standards will be met. We understand that EPA will be developing such guidance to deal with the difficult and unique issues faced in reconciling water quality issues where hydrological modifications predate state water quality standards. In the absence of such guidance, the Region, in consultation with EPA Headquarters, has taken a reasoned approach in interpreting subsection 131.10(g)(4). Thus, the Region has considered the practical and environmental implications of modifying the operation of the dam, as well as the technical and economic feasibility of doing so.

In the situation involving the Ripogenus Impoundment, we are willing to accept the State's finding, based on the UAA documentation and public comment, that it is not feasible to operate the dam in a way that would maintain the Class C habitat and aquatic life criteria, in part because the aquatic community that has evolved in the impoundment and downstream waters constitute an important fishery resource that would be at risk should the project's operation be significantly altered. In making our decision, we acknowledge that the company has, as part of the FERC mandated environmental review, made some concessions by agreeing to adjust its operation of the dam to further protect the downstream fishery and to remediate the dry reach in the upper gorge. While not used as a basis by the State,

¹ As we stated in our February 4, 1992 letter, EPA recognizes that the requirement to meet the "natural" Class A/GPA or "unimpaired" Class B habitat and aquatic life use may not necessarily be appropriate for all situations involving existing impoundments. We therefore accepted the language in Part B of P.L. 1992, Chap. 813, which provides that the habitat and aquatic life uses would be met for certain Class A and GPA existing hydropower impoundments if those waters could support the criteria in the lowest classification, that is, Class C. As a result, under the current classification, the Ripogenus impoundment does not have to meet the "natural" criteria for the habitat and aquatic use; rather it must, achieve the Class C criteria which requires that the impoundment support "all species of fish indigenous to those waters and maintain the structure and function of the resident biological community, provided that some changes to aquatic life may occur due to the hydrologic modifications of the impoundments." It has consistently been the Region's position that in order to go below the Class C criteria for the habitat and aquatic life use, as is proposed for the Ripogenus impoundment, the federal procedures requiring a UAA and public participation must be satisfied.

there is also evidence in the record suggesting widespread adverse economic and social impact in the project area should major operational changes be required.

We wish to point out that the UAA prepared in this case, although acceptable under the unique circumstances presented by the Ripogenus impoundment (i.e., the valuable fishery that results from the current operation of the dam), it may not be satisfactory under other circumstances. In those more common cases where there is no clear environmental benefit resulting from continuing the current operation of the dam, the burden to support the status quo would be higher.

Although not a factor affecting our approval of the State's proposed downgrade in this specific case, we find that there were several comments made by the environmental groups during the public participation portion of the UAA process that raise issues which should be addressed in either the CWA section 401 proceeding or FERC relicensing. For example, recent information regarding tissue mercury concentrations in fish and bald eagles should be considered in the ongoing environmental review of the Ripogenus and other Maine hydropower relicensing activities. We suggest the CWA section 401 review and FERC environmental assessment evaluate the role of the impoundment's operation on the mobilization of mercury through the food chain. Should linkage between impoundment management and tissue toxicant levels be established, appropriate license conditions should be included or added.

We believe that today's approval of the Ripogenus Impoundment water quality standard downgrade demonstrates that the UAA and public participation process can work and provides support for the State to take action to address EPA objections to Part A of P.L. 1992, Chap. 813. We are concerned that this legislation may be used to avoid the UAA and public participation downgrading requirements in other FERC relicensing cases in Maine in the future.

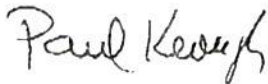
As you know, EPA issued a CWA section 303(c)(3) letter to the State disapproving the standards change made by Part A of this legislation. It is our understanding that the State intends to draft and submit new legislation amending the water quality standards this session so as to correct the problems identified in our disapproval letter. Such standards amendments must be presented this session, or, in accordance with the CWA, EPA will be required to begin the process of promulgating a federal standard. As we have stated previously, we believe that as part of the amendments, Maine should incorporate UAA and public participation requirements comparable to those in the federal regulations directly in the state law, as other states have done. The amendments to the water quality standards should also include necessary reclassification of the Ripogenus Impoundment,

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specifying the new lower criteria for that water body. We urge the State to involve EPA at the earliest possible date and forward a copy of the draft legislation when it is ready to EPA for review and comment.

As always, my staff and I are willing to meet with the State and other interested parties to try to resolve the inconsistencies between State standards and federal requirements. Please call me, or have your staff contact Eric Hall of the Water Management Division or Tonia Bandrowicz of the Office of Regional Counsel at (617) 565-3533 and (617) 565-3316, respectively.

Sincerely,



Paul G. Keough
Acting Regional Administrator

cc: Steven W. Groves, ME DEP
Tim Glidden, ME OPA
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